

WHO DECIDES THE LAW OF THE LAND?



While the United States hurtles towards the twenty-first century, the American-Indian nations within its borders are struggling to maintain the ancient customs and traditions that define their cultures. A cornerstone of these cultures is a deep sense of interconnectedness with the natural environment—the tribes see themselves as being as much a part of the landscape as they are dependent upon its natural resources to survive. American Indians, therefore, view the purity of the land as paramount to their continued existence. “Our culture is derivative of the natural resources,” says Stuart Harris, a Cayuse Indian and a senior staff scientist with the Department of Natural Resources for the 3,000-member Confederated Tribes of the Umatilla Indian Reservation, based in northeastern Oregon. “If our culture dies, the only remnants are its physical attributes, which will soon be dispersed to the natural environment. If that happens, there will be no trace of our living culture.”

And yet, most American Indian tribes are faced with a number of significant environmental problems. Basic necessities such as safe drinking water and sewage treatment are frequently in short supply. Many reservations are located in remote areas without municipal landfills, and it is not uncommon for waste to accumulate to levels that pose an environmental hazard. A number of tribes are located adjacent to hazardous waste sites. Chemical wastes emanating from these sites have been known to contaminate waterways on tribal lands and pollute fish, which are a staple of many Indian diets. Midnight dumping, whereby solid, liquid, and sometimes hazardous wastes are abandoned in open, unregulated areas by tribal members and non-Indians alike, is a persistent problem. For some tribes, the accumulated impact of these activities has created a state of environmental crisis.

Sovereign Status—No Guarantees

Whereas environmental problems are also

shared by other minority groups in the United States, American Indians are unique because, in addition to their status as U.S. citizens, many of them are also members of federally recognized sovereign nations that, in theory, have the authority to manage their environmental problems independently. Like many other American Indians, Harris believes that the key to the preservation of tribal lands and culture is sovereignty. As sovereign nations, the tribes can make laws governing the conduct of Indians in “Indian country” (an all-encompassing term that refers to all existing American Indian tribes, governments, people, and territory); establish tribal police and court systems; regulate hunting, fishing, land use, and environmental pollution; and levy taxes. Similar to individual states, tribal nations can also apply for and assume enforcement responsibility for federal environmental programs. Nonetheless, a number of shortcomings continue to weaken tribal authority over environmental affairs. One chronic

problem is that Indian governments, with few exceptions, are woefully understaffed, poorly trained, and low on funds. Jurisdiction over non-Indians residing both within and adjacent to Indian country is also a difficult political and legal issue, and tribal attempts to regulate non-Indian polluters are frequently bogged down in the courts. Finally, and perhaps most importantly, the tribes and the federal government often find themselves separated by a profound cultural divide, across which both sides must carefully navigate as they attempt to communicate with each other and agree on common goals.

As sovereign nations, the 561 federally recognized American Indian tribes are supposed to negotiate with the United States on a government-to-government basis. This status is not new to them; the English, French, and Spanish all signed treaties with tribal nations, and the ever-encroaching United States simply followed suit. Today, their sovereign status is stronger than it has ever been in the past. U.S.-tribal relations are in a period known as the "Self-determination Era," in which the United States is attempting to shift as much regulatory authority to the tribes as possible. This policy has been reinforced by the Clinton administration, which in 1994 issued a presidential memorandum entitled *Government to Government Relations with Native American Tribal Governments*. The memorandum mandates that federal agencies undertaking actions that affect tribal rights or trust resources implement them in a "knowledgeable, sensitive manner respectful of Tribal sovereignty."

Sovereignty aside, reality dictates that financial resources are the real determinants of tribal power. And according to Catherine Fox, the tribal coordinator at the EPA Office of Enforcement and Compliance Assurance (OECA), years of federal neglect have left most tribes unprepared to address their environmental problems. Though this issue has begun to be addressed by the EPA in recent years, "many of the tribes are 50 years behind the states in managing health and environmental problems within their lands," Fox says. Charlene Dunn, tribal coordinator with the EPA's Office of Solid Waste and Emergency Response, agrees with this assessment. "For years we provided money, training, and peer exchange to the states, lots of assistance. We haven't done this for the tribes in the past," says Dunn. "The problem was compounded because many of the tribes have limited sources of revenue, and are much more dependent on money from the federal government."

Because federally approved tribal regulatory programs have been essentially nonexistent,

enforcement responsibility on the reservations generally has fallen to the EPA. But many within both the tribes and the federal government believe that the EPA, if only because of its own limited resources, has often neglected its managerial and enforcement responsibilities. One area where this problem may have been particularly acute is the tracking of environmental monitoring data on the approximately 850 industrial facilities located on tribal lands. For example, Fox notes that records contained in the EPA data system indicate that up to 61% of all air-permitted facilities (facilities granted an emissions permit under the Clean Air Act [CAA]) on tribal lands "appear to have never been inspected." This information was obtained from the OECA's American Indian Lands Environmental Support Project, which is a publicly available database that attempts to integrate and assess point-source releases, potential impacts of contaminants, and enforcement histories for facilities located on or near tribal lands.

Federal recognition of the tribes' need for funding and assistance appears to be gaining in momentum, however. The last 3-4 years have seen an unprecedented flow of money directed towards Indian offices within the EPA and other federal agencies. These funds are being funneled to the tribes in the form of grant programs. An example is the EPA's Indian Environmental General Assistance Program (GAP), which provides federally recognized tribes with money to hire staff and assess environmental resources and pollution threats. These funds are designed to help tribes "build capability" towards establishing federally approved environmental programs. Capability building activities that are eligible for funding under the GAP program include planning, hiring staff, and monitoring and assessing environmental resources and pollution threats. As of July 1996, GAP grants had been awarded to approximately 100 tribes.

A number of tribes have newfound wealth resulting from their own industries, particularly gaming and casinos. Dunn observes that the wealthy tribes are, for the most part, paying for their own environmental protection programs. However, she points out that wealthy tribes are the exception rather than the rule. A few very wealthy tribes, for example the Pequot Tribe in Ledyard, Connecticut, that runs Foxwoods (currently the largest casino in the world), create the false impression that all tribes with gaming industries have a lot of money. "Most tribes are running much smaller scale gaming operations and a good deal of the revenue generated is still going back to the initial investors," Dunn says. "In any case,

that doesn't allow us to abrogate our responsibilities to tribal governments. [The EPA] is still responsible for providing them with adequate environmental protection."

Like the states, tribes with federally approved programs can also set their own environmental standards, and many of them are beginning to do so. The EPA is still finalizing regulations regarding how tribal standards will be handled under the CAA, and no tribal standards for air quality have yet been established. Tribal authority under the CAA is currently limited to the tribes' ability to petition the EPA to reclassify airsheds within their reservations to Class One, or most strictly protected. However, 18 tribes have developed standards for surface water quality under the Clean Water Act (CWA).

But what happens when the standards set by the tribes are more stringent than those set by the EPA or the states? The question becomes whether the tribal standards can be enforced.

Jurisdiction—Who's in Control?

Tribal nations are often fractionated, and populated by large numbers of non-Indians who may reside or have businesses on so-called "fee lands" that they have purchased within the reservation. Such individuals generally have unqualified ownership over the land and the power to use it as they choose. Therefore, the extent to which they are held to tribal, rather than federal or state, standards is often unclear and a source of considerable friction between the fee occupants and their tribal neighbors.

According to Merv Tano, an attorney based in Denver, Colorado, who frequently advises tribal nations on environmental issues, the jurisdictional authority of tribal governments on Indian country is strongest when the tribes live in contiguous reservations, populated primarily by Indians. "However, when this is not the case and we are dealing with a geographically fractionated nation, we go from talking about sovereignty to a point where we're talking about balancing interests," he says. "We're looking at things like who owns what, and how many of 'us' there are compared to how many of 'them.' This is made even more difficult because there's no bright line demarcating where tribal authority begins and ends."

Most disputes involving the rights of tribes to impose their own environmental regulations upon non-Indians on fee lands are resolved by application of the "Montana test," which is based upon the U.S. Supreme Court's 1991 decision in *Montana v. the United States*. In determining a tribe's jurisdiction under the Montana

test, the EPA conducts a fact-specific analysis, and bases its decision on whether the conduct of the fee occupants "threatens or has some direct effect on the political integrity, economic security, or the health and welfare of the Tribe."

But questions over jurisdictional authority become even more complicated on the vast tracts of Indian country that are held in trust by the U.S. government. Although trust lands do not contain reservations, in many cases they lie adjacent to them. Many of these so-called trust arrangements have their origins in treaties that were signed in the 1850s and 1860s, whereby the tribes ceded limited control of their lands in exchange for peace with the relentless intruders and armies of the United States, and protection by the government. Under the federal trust relationship, the government obligated itself to look after the best interests of the tribal members, and the tribes retained the rights to hunt, fish, and gather in "all the usual and accustomed places."

However, the trust relationship has never been clearly defined. It wasn't created by a single document, nor is its scope delineated in any one place. The exact nature of the relationship therefore remains ambiguous and a source of considerable debate. The EPA's reading of the government's responsibility under the trust relationship, described in the EPA American Indian Office document *Working Effectively with Tribal Governments*, entails meeting "standards of good faith and due diligence, as well as protecting and managing Indian lands and natural resources." The American Indians, on the other hand, fall back on the original treaties that they claim guaranteed them the rights to use these lands in the same way that their ancestors did. Problems arise when the land is contaminated, rendering traditional subsistence lifestyles impossible.

Nowhere is this dispute more evident than in the Indians' negotiations with the Department of Energy (DOE) over cleanup of DOE sites on the Superfund National Priorities List. Many of these sites are contaminated with plutonium and other radionuclides, as well as a host of other industrial chemicals including heavy metals, organic solvents, and polychlorinated biphenyls. In their dealings with the DOE and other agencies involved in the cleanup of these sites, the tribes are often frustrated by what they see as a manipulation of the treaty rights and trust conditions they believe guaranteed them the use of these lands in accordance with their traditional customs. Most tribal environmental managers insist

that the risk assessments used to guide the cleanup of these lands be based upon American Indian exposure scenarios. These scenarios incorporate higher rates of important parameters, such as fish consumption and soil ingestion, than do the residential and industrial scenarios typically used by the EPA. Therefore, the cleanup standards proposed by the tribes are more demanding than those proposed by the federal agencies.

"Compliance, compliance, compliance!" says Russel Jim, manager of the environmental restoration and waste management program for the Washington-based Confederated Tribes and Bands of the Yakama Indian Nation, when asked what he believes is the single greatest obstacle to a harmonious coexistence with the DOE. "They have to understand that we have the most at stake here," he says. "The treaty rights are the law of the land, and the DOE should comply with them." The Yakama Nation, along with the Umatilla and Nez Perce tribes, is currently negotiating with the DOE on the cleanup of the Hanford nuclear site in Washington State. Contamination from this site is affecting the Columbia River salmon fishery, which is a resource of tremendous cultural significance to the tribes. The Hanford site itself, which is located entirely on land ceded by treaties to the federal government to be held in trust, is so contaminated that the safe exercise of treaty-reserved rights may never be possible again, according to Harris and Barbara Harper, a risk assessor working with the Yakama Nation.

Compliance or not, the tribes are locked into the stakeholder process, and their own interests comprise but one voice among the many that the DOE and the other federal agencies listen to as they determine how and where the sites will be cleaned up, according to Kevin Clarke, manager of the DOE's Hanford Facilities Indian Nation Program. Additionally, the DOE is attempting to indirectly integrate American Indian concerns into DOE decision making in several ways including through the Consortium for Risk Evaluation with Stakeholder Participation (CRESP)—a national organization that has been established to develop a credible strategy for risk-based cleanups, especially at DOE sites. Harris notes that CRESP draws input from a number of affected parties including regulators, tribes, and other stakeholders. However, he acknowledges that the tribe's status within the consortium is unique. "Unlike other entities that the DOE has to deal with, we have legal obligations to our tribal members that originate with treaty rights," he says.

The Final Word

Ultimately, the conflicts distill to economics—the amount of money available for cleanup. According to Dunn, the tribes' objectives to apply more stringent cleanup standards are at increasing odds with those looking to reduce expenditures on environmental cleanup. "What the tribes may want as a standard may cost millions of dollars more, and the current mood of the country is to cut the costs of cleanup," she says. Harris and Harper note that there is no forum for discussion of creative solutions that satisfy tribal health and equity concerns and are economically feasible as well.

Of course, exacerbating these issues is a clash of cultures. The EPA and other federal agencies operate within their own systems, which can act to impede relationships when the tribes don't understand their bureaucratic language and methods. For example, Indian leaders are typically very concerned about the lives of their people on an individual level, and it isn't uncommon for a tribal leader to sit by the bedside of a terminally ill member. Because each member of a tribe is vitally important, tribal leaders may be uncomfortable with the EPA's impersonal, numerical estimates of acceptable risk. Tribes are building considerable expertise in risk assessment, however, says Harris, and are providing the EPA with recommendations on how to improve risk assessment and risk-based decision making.

Although concern over contamination at hazardous waste sites is important, more basic issues such as solid waste disposal, underground storage tanks, and safe drinking water are also major problems on tribal lands. "The big issue is everyday government services like trash pickup, being able to drink water from the tap, being able to flush the toilet without polluting the local reservoir—this is where the biggest health and environmental problems exist," says Tano.

Fortunately, these problems are being addressed as the tribes continue to develop their own environmental programs. Environmental problems on tribal lands are vast, however, and the success of these programs will depend on continued dialogue between the tribes, the states, and the federal government; consistent and targeted funding; and understanding of cultural differences.

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